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No. 92-1588

In The

Supreme Court of the United States

October Term, 1992

BRUCE COMMITTE,

Petitioner,

vs.

UNIVERSITY OF VERMONT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

WHETHER THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT PETITIONER, A NON-TENURED FACULTY MEMBER AT A PUBLIC INSTITUTION OF HIGHER EDUCATION, HAD NO CONSTITUTIONALLY-PROTECTED PROPERTY INTEREST IN CONTINUED EMPLOYMENT.

STATEMENT OF THE CASE

This case involves the denial of reappointment to Petitioner Professor Bruce E. Committe (Prof. Committe), a former faculty member employed on a term contract basis by Respondent University of Vermont and State Agricultural College ("UVM"), a state-chartered and supported institution of higher education located in Burlington, Vermont ("UVM").

Prof. Committe received his first appointment as an assistant professor in the UVM School of Business Administration ("SBA") for a term covering the three academic years 1987-88 through 1989-90. He received one two-year reappointment covering academic years 1990-91 through 1991-92, and was then denied a second reappointment.

Prof. Committe filed suit in the United States District Court for the District of Vermont on October 1, 1991, claiming that the denial of a second reappointment infringed his constitutionally-protected rights. UVM answered the complaint on October 10, 1991. On November 4, 1991 Prof. Committe filed a pleading indicating that he was ready for trial. On November 14, 1991, UVM filed a Motion for Summary Judgment. Prof. Committe

thereafter filed a Cross-Motion for Summary Judgment. On July 6, 1992, Chief Judge Fred I. Parker granted UVM's motion and denied Prof. Committe's cross-motion on the grounds, *inter alia*, that no constitutionally-protected liberty or property interest was implicated in UVM's decision not to reappoint Prof. Committe.

Prof. Committe appealed the due process issue to the Second Circuit Court of Appeals. On December 28, 1992, the Court of Appeals affirmed the grant of summary judgment in favor of UVM, holding that Prof. Committe had no legitimate expectation of continued employment at UVM, under the clear terms of the parties' contract. On March 15, 1993, the Court denied Prof. Committe's petition for rehearing en banc, noting that no Judge of the Court had requested that a vote be taken thereon.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

1. The pertinent circuit court decisions, following the decisions of this Court, consistently hold that absent a legitimate expectation of continued employment, a non-tenured faculty member at a public institution of higher education, like Petitioner, has no constitutionally-protected right to due process in a decision not to renew his employment contract.

2. The decision-making process by which Petitioner was denied reappointment complied with all arguably applicable due process requirements.

ARGUMENT

A nontenured faculty member at a public institution of higher education must show more than a unilateral expectation of continued employment to claim due process rights in connection with the institution's decision not to renew his employment contract.

The *Officers' Handbook* which governs relations between UVM and its faculty members created no property interest in continued employment that would have entitled Prof. Committe to constitutionally-mandated due process protections prior to UVM's decision not to renew his contract.[1] Furthermore, review by certiorari is particularly inappropriate in this case because UVM in fact afforded Prof. Committe all of the procedural protections specified by the *Handbook* provisions. For these reasons, Prof. Committe's Petition for a Writ of Certiorari should be denied.

I. IN THE ABSENCE OF A LEGITIMATE EXPECTATION OF CONTINUED EMPLOYMENT, A NONTENURED FACULTY MEMBER AT A PUBLIC INSTITUTION OF HIGHER EDUCATION HAS NO CONSTITUTIONALLY-PROTECTED RIGHT TO DUE PROCESS IN THE DECISION NOT TO RENEW HIS EMPLOYMENT CONTRACT.

Prof. Committe claims as a basis for his petition that the Court of Appeals' decision conflicts with "three

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[1] The text of most of the pertinent provisions of the *Handbook* is set forth in Prof. Committe's Petition at pages 6-35. The text of any additional pertinent provisions is set forth herein.

applicable landmark decisions" of this Court. Petition for Writ at 39-51 (citing *Olim v. Wakinekona*, 461 U.S. 238 (1982) (considers Fourteenth Amendment liberty interests in prison context); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972)). This is a misstatement of the applicable law.

It is settled law, in accordance with the decisions of the circuit courts and this Court, *see* Sup. Ct. R. 10.1(a), (c), that to be entitled to due process, one must have suffered by state action the loss of a property or liberty interest. *Clark v. Whiting*, 607 F.2d 634, 641 (4th Cir. 1979) (citing *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974); *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 421 (1st Cir. 1986) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)). Prof. Committe argues here, as in the district and circuit courts, that UVM's decision not to renew his contract implicates Fourteenth Amendment property rights. However, as this Court observed in *Board of Regents v. Roth*, "[t]o have a property interest in a [job], a person clearly must have more than an abstract desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. It is a virtually universal rule that a university professor hired as a probationary employee, without tenure and on a term contract basis, has no constitutionally-protected property interest in continued employment. See, e.g., *King v. Board of Regents of the University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990); *Upadhya v. Langenberg*, 834 F.2d 661 (7th Cir. 1978), *cert. denied*, 486 U.S. 1033 (1988); *Lovelace*, 793 F.2d at 421; *Beitzell v. Jeffrey*, 643 F.2d 870, 874-75 (1st Cir. 1981).

To establish a "legitimate claim of entitlement" and therefore a property interest in continued employment, university faculty members must "look to 'existing rules or understandings that stem from an independent source such as state law. . . . ' " *Royster v. Board of Trustees of Anderson County School District,* 774 F.2d 618 (4th Cir. 1985) (quoting *Board of Regents v. Roth,* 408 U.S. at 577). "In the context of employment in public education, the independent source for the property interest has been said to be a contract which provides for continued employment, and which can be terminated *only for good cause." Id.* (emphasis added).

The terms and conditions of faculty employment at UVM are governed by the provisions of individual contracts and more generally by the provisions of the *Officers' Handbook.* Prof. Committe argues that the *Handbook* is an independent source for his claimed property interest. He claims that the Court of Appeals employed an overly rigid "tenured versus nontenured" test in finding that he had no legitimate expectation of continued employment. Petition at 47. This is a misstatement. The Court of Appeals did not base its decision on a mere semantic distinction; rather, it considered the governing contract language, and based its decision on the functional characteristics of petitioner's nontenured status. *See* Petition App. at 7 (*Committe v. University of Vermont,* No. 92-7755, slip op. (2d Cir. Dec. 28, 1992)). Prof. Committe also claims that the *Handbook*'s description of various criteria to be considered in the decision-making process gives him a legitimate expectation of continued employment. This argument ignores the *Handbook* provisions which emphasize the probationary nature of Prof. Committe's

employment, and amounts to a misstatement of fact. The Court of Appeals correctly rejected the argument in light of the *Handbook*'s clearly-stated probation provisions. *Id.*

As noted by the Court of Appeals, the *Officers' Handbook* provides at Section 208.2 that "[i]nitial appointments as an assistant professor are on a probationary basis." Petition at 8. An assistant professor becomes eligible for tenure at the rank of assistant professor "only after an uninterrupted seven-year probationary period." Section 208.2 [Petition at 8]. Promotion of an assistant professor to the rank of associate professor, whether done at the expiration of the seven-year probationary period or earlier, also results in the grant of tenure. Section 208.3. Neither tenure nor promotion is automatic, however. The *Officers' Handbook* provides:

> [t]he performance of an Officer of Instruction should be reviewed annually during this [probationary] period. The record of performance and the judgment of potential for future accomplishment form a basis for decisions concerning renewal of the appointment or the eventual decision to grant tenure or not.

Section 205.3 [Petition at 6-7]. Similarly, the section of the *Officers' Handbook* which describes criteria to be used in making reappointment and tenure decisions states:

> .1 *General Considerations.* In considering candidates for . . . reappointment . . . each candidate will be judged with respect to the proposed rank, status, and duties, considering his . . . record of performance in teaching, research or other creative work, and service.
>
> . . . .

> *In evaluating the candidate's qualifications within these three areas, reasonable flexibility shall be exercised. . . .*

Section 223.1 [Petition at 10-11] (emphasis in original). *See also Officers' Handbook* sections 223.2-223.4 [Petition at 12-24]. As noted by the Court of Appeals, Prof. Committe was denied reappointment because his teaching skills failed to meet UVM's expectations.[2] *Handbook* section

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[2] Petition App. at 8 (*Committe v. University of Vermont*, No. 92-7755, slip op.). Specifically, after reviewing student course evaluations, letters from students and alumni, course materials and reports of classroom visits by other faculty, the Faculty Standards Committee ("FSC") concluded:

> Professor Committe's classroom instruction needs more attention and improvement. Special concerns include the ineffective use of class time, the lack of organization in presenting the subject matter and the lack of clear and crisp responses to student's questions.

Respondent's Appendix to Court of Appeals at 13.

> As its "Overall Recommendation" the FSC concluded: Given that one of the most important missions of the School of Business is excellence in undergraduate teaching, Professor Committe's poor performance in the classroom was perceived by the FSC as a very serious flaw. The FSC recommends that Professor Bruce Committe not be reappointed. The vote on reappointment was 3-yes, 13-no, 0-abstentions.

Respondent's Appendix to Court of Appeals at 14. After the FSC recommendation, the renewal issue went to the Dean of SBA, whose written decision accepting that recommendation included the following:

> Dr. Committe's teaching performance does not meet standards and expectations for second reappointment at Assistant Professor rank. . . . Further, although Dr. Committe was notified of concerns and suggestions with respect to teaching at the time of his first reap-

223.2, [Petition at 11-15], sets forth an extensive, non-exclusive description of factors to be considered in the evaluation of teaching performance.

Thus, the *Handbook* does give some guidance on how performance in general, and teaching effectiveness in particular, may be evaluated in considering a renewal contract. However, the mere delineation by an institution of guidelines or standards does not turn otherwise-probationary employment into a constitutionally-protected expectation. As one court reasoned:

> [I]n view of the substantial commitment a university makes to an individual by granting him tenure, universities have a strong need for, and traditionally have enjoyed a wide discretion in exercising what is largely a subjective judgment in deciding whom to grant tenure. By specifying in writing the usual criteria for promotion – teaching, scholarship, service – a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure. That reappointment, rather than tenure, is at stake in the present case does not affect our conclusion, for plaintiff's argument would apply as well to one as the other.

> pointment, it is not apparent that he has made efforts to generate additional or alternative information, or take other steps demonstrating his teaching effectiveness.

Respondent's Supplemental Appendix to Court of Appeals at 97.

Lovelace v. Southeastern Massachusetts University, supra, 793 F.2d at 422 (citations omitted). *See also Goodisman v. Lytle,* 724 F.2 818, 821 (9th Cir. 1984); *Stebbins v. Weaver,* 537 F.2d 939, 942 (7th Cir. 1976).[3]

Prof. Committe also ignores the distinction made in the *Officers' Handbook* between the grounds for non-renewal of a probationary contract and the grounds for termination of a tenured appointment. *Handbook* section 205.4 states:

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[3] The Fourth Circuit has also reached the same result in a case where the defendant university's faculty handbook provided greater procedural protections than would be required if due process were mandated. In *Kilcoyne v. Morgan,* 664 F.2d 940 (4th Cir. 1981), a nontenured faculty member argued that the procedures used by his university in denying him tenure failed to conform precisely to the procedures outlined in the faculty manual. The court observed:

> [f]ar from disclosing a violation of his constitutional rights, Kilcoyne's complaint reveals that ECU provided procedural safeguards beyond the requirements of the Fourteenth Amendment. Because he lacked a right to further employment at ECU, his denial of tenure and further employment without *any* procedural safeguards would have been permissible under the Fourteenth Amendment.

Id. at 942. If Kilcoyne's employer had gratuitously afforded tenure applicants procedural safeguards not constitutionally required, "deviations from those procedures would not support a claim under the Fourteenth Amendment and Section 1983." *Id.* While Prof. Kilcoyne argued that the procedures were more than gratuitous by virtue of being set forth in the faculty manual, the court nevertheless held that a contractual claim for breach of promise "is not elevated to a constitutional question solely because the State is a party to the contract." *Id.*

> nonrenewal of an appointment does not carry with it implication of incompetence or misconduct on the part of the Officer of Instruction. *In addition to considerations of individual performance, such decisions may be based on a variety of reasonably derived administrative, financial, or academic policy reasons;* on an assessment of insufficient potential for future growth of the officer; or on a prior and independent judgment that the position should be redefined.

[Petition at 7-8] (emphasis added). Thus, the *Handbook* clearly states that nonrenewal decisions may be based on factors other than the "particularized, substantive criteria" contemplated by Prof. Committe. *See* Petition at 47-48.

Termination of a tenured position, on the other hand, may be done only by UVM's Board of Trustees, "for cause, defined as demonstrated lack of professional or moral fitness, incompetence as a teacher, or gross neglect of duty." *Officers' Handbook*, section 224.1. It is clear from the *Handbook* provisions, therefore, that a distinction was intended between nonrenewal of a nontenured employment contract, and termination of a tenured contract, and only the latter requires "cause" in a sense that could give rise to a protected property interest.

For these reasons, the Court of Appeals was correct in holding that Prof. Committe had no legitimate expectation of continued employment that would entitle him to due process protections, under the applicable decisions of this Court and consistent with the other Courts of Appeals that have considered the issue.

II. THE DECISION-MAKING PROCESS BY WHICH PETITIONER WAS DENIED REAPPOINTMENT COMPLIED WITH ALL ARGUABLY APPLICABLE DUE PROCESS REQUIREMENTS.

Should this Court be inclined to reconsider its clear decisions in the area of due process entitlement for non-tenured faculty members at public institutions of higher education, this case is not an appropriate vehicle for such reconsideration.

Because the Court of Appeals held that Prof. Committe had no legitimate expectation of continued employment at UVM and thus was not entitled to due process, it was not strictly necessary for the Court to consider the issue of whether Prof. Committe in fact *received* due process. Nonetheless, it is noteworthy that the Court of Appeals found on a review of the record that Prof. Committe's reappointment was evaluated according to established university procedures, and thus that he received all process to which he was arguably entitled under the Constitution and his contract with UVM. Petition App. at 8 (*Committe v. University of Vermont*, No. 92-7755, slip op.). The Court also noted that Prof. Committe was not denied reappointment for any discriminatory reason, but rather because his teaching skills failed to meet UVM's expectations. *Id. See also* footnote 2, *supra*.

Therefore, because the Court of Appeals essentially found that there is no substantive merit to Prof. Committe's claims under the standard for summary judgment, a finding by this Court on the abstract question of

entitlement to due process would ultimately have no practical effect on the outcome of this case.

CONCLUSION

Prof. Committe's Petition raises no issue that would warrant the grant of certiorari in this case. In accordance with the pertinent circuit court decisions, following the decisions of this Court, *see* Sup. Ct. R. 10.1(a), (c), the Court of Appeals correctly concluded that Prof. Committe had no legitimate expectation of continued employment at UVM that would entitle him to due process protections. Furthermore, the decision-making process by which UVM denied reappointment to Prof. Committe complied with all arguably applicable due process requirements. For these reasons, Prof. Committe's Petition for Writ of Certiorari should be denied.

Respectfully submitted, this 3rd day of May, 1993.

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